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Purchasing Department
Office of the Director



February 21, 1986

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To : Contracting Departments (see list on page 3)

Through: Roger Boas
Chief Administrative Officer

From : M. H. Geistlinger
Director of Purchasing and Services

Subject: Draft Regulations implementing the South African Divestment Ordinance

Section 10.215 of new Article XIX of the Administrative Code requires the Treasurer and the Purchaser to promulgate appropriate regulations to implement the Divestment ordinance. Purchasing has prepared a first draft of regulations relating to the purchase of services and commodities, and the draft is enclosed with this memo.

This memo is being sent to all of you because Purchasing's records indicate that your departments historically have prepared and executed contracts for some or all of your needs. As a result, your organizations, as contracting departments, will be directly affected by the new ordinance.

As the draft ordinance was being considered by a committee and then by the full Board, Purchasing circulated drafts, comments, and questions on the pending legislation to only a few contracting departments. We limited distribution to the departments which appeared to commit the largest share of City funds.

With the draft regulations, however, we reach a different phase. The regulations are more detailed than the ordinance, and so it is important for all of us to consider, individually and probably as a group, how the regs may affect all the contracting departments.

I need your review (as contracting officers) of the enclosed document. Purchasing's goal is to promulgate regulations which will provide guidance for contracting officers as they comply with the ordinance in the contract award and administration processes. To this end, I would like the regulations to contain a reasonably comprehensive set of examples of contracting situations which the ordinance will affect. The more situations the regulations address, the fewer occasions, I hope, contracting officers will have to request a legal opinion.

(We hope to distribute the final regulations to all City departments so everyone will be aware of how their purchases may be affected.)

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The Mayor signed the ordinance on February 7, which would make March 10 the ordinance's effective date. All commodity contracts signed on or after that date must comply with the ordinance (see §10.214.C.1). All service contracts which are signed, or whose bid packages have been advertised or whose competitive and sealed bids have been received, on or after that date, must also comply (see §10.213.E.1).

Here are the events which probably must happen before the regulations become final:

- | | |
|--|-------------|
| 1. First draft by Purchasing | February 21 |
| 2. Review by contracting departments; return of drafts with comments to Purchasing | March 7 |
| 3. Second draft by Purchasing (draft sent to contracting departments and City Attorney) | _____ |
| 4. Meeting with contracting departments, chaired by City Attorney | _____ |
| 5. Final draft by Purchasing | _____ |
| 6. Review by City Attorney | _____ |
| 7. Publication by Purchasing, by mailing to contracting departments, distribution within Purchasing, and possible distribution to all other City departments | _____ |

Given the number of contracting situations which should be covered, the length of this first draft (43 pp.), and the above chronology, the final regulations cannot be in place by March 10. Therefore, we should strive to have them in place as soon as possible thereafter.

The regulations have taken a position on every situation which appears as an example. The positions represent Purchasing's opinion of the effect, and interplay, of the following factors:

- a. the language of the ordinance itself
- b. intent of the ordinance
- c. the most practical approach to procuring services and commodities

Please feel free to disagree with how Purchasing has viewed the situations set forth. Also, please suggest other examples which can illustrate usefully the application of the ordinance.

The City Attorney will be the final authority on how your departments and Purchasing have interpreted the ordinance as these regulations are formulated.

Please send me your written comments on the draft regulations by March 7. Purchasing will consolidate everyone's comments as much as possible, and then circulate the second draft. Then, as the schedule indicates, a large meeting would be scheduled, chaired by the City Attorney's Office. I believe that the document can be refined more quickly in the second round if everyone is seated at the same table where we can all benefit from one another's ideas.

If you have no comments on the regulations, please feel free to use the approval line below to let me know. This should help avoid unnecessary copying and volumes of paper.

Please call me if I can provide any additional information. Thank you in advance for reviewing this large document and for helping Purchasing discharge its responsibilities under the ordinance.

MHG:mr

Enclosure

Distribution to Contracting Departments:

Mayor Dianne Feinstein	
Claire Isaacs	Director, Arts Commission
Rand Castile	Director, Asian Art Museum
Dr. Frank Talbot	Director, California Academy of Sciences
Roger Boas	Chief Administrative Officer
George Agnost	City Attorney
Dean Macris	Director, City Planning
Hilary Hsu	Chancellor and Superintendent, Community College District
David Gordon	Director, Convention Facilities
Ian McKibbin White	Director of Museums, Fine Arts Commission
Ray King	Director, Parking Authority
Eugene Gartland	Executive Director, Port of San Francisco
John C. Frantz	City Librarian, Public Library
Rudy Nothenberg	Director, Public Utilities Commission
Don Birrer	Director, Public Works
Wallace Wortman	Director, Real Estate
Mary Burns	Director, Recreation and Park Department
Clare Murphy	General Manager, Retirement Board
Wilbur W. Hamilton	Executive Director, S.F. Redevelopment Agency
Louis Turpen	Director, San Francisco International Airport

Approved:

Date

Regulations Implementing the
Divestment of City Funds Ordinance,
Article XIX, Sections 10.210 to 10.220 of the Administrative Code

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Regulations Implementing the
Divestment of City Funds Ordinance,
Article XIX, Sections 10.210-10.220 of the Administrative Code

Summary: Ordinance No. ____-86, enacted January 27, 1986, and effective March 9, 1986, generally prohibits deposits, investments, contracts or purchases involving City funds with persons, financial institutions or other businesses having certain business relations with the government of South Africa or in South Africa. The ordinance states that the Treasurer and Purchaser are responsible for promulgating rules and regulations necessary to implement the ordinance. To that end, the Purchaser hereby promulgates rules and regulations affecting contracts for the purchase of services and commodities.

I. Policy

San Francisco's policy, as expressed in the ordinance, is to avoid purchasing services and commodities from businesses which have certain specified ties to South Africa. See the ordinance or the sample affidavit (Exhibit 1 to these regulations) for particulars.

II. Definitions

This section defines many of the terms which appear in these regulations. Relevant definitions from the ordinance, other parts of the Administrative Code, and the City Charter are included and indicated.

Definitions with no other indication appear herein for the first time.

"Affidavit" shall mean the document specified by the Treasurer or Purchaser, as appropriate, which financial institutions and service contractors are requested to execute and submit to the City. See Section V, "Purchase of Services," part A, "Collection of Affidavits."

"Assignment" shall mean an agreement between the City and a contractor whereby the parties agree that the contractor's obligations shall be performed in whole or in part by a third party.

"Bid" shall mean price information provided by the vendor to the City in response to a newspaper advertisement placed by the City. See "quotation" below.

"City" or "City and County" shall mean the City and County of San Francisco, or any department, board, commission or agency thereof.
[Ordinance]

"Commodities" shall include, but not be limited to, goods, commodities, materials, supplies, vehicles, machinery, and equipment. [Ordinance]
For purposes of these regulations, "commodity" shall include computer software.

"Contract" shall include, but not be limited to, any contract, purchase order, term purchase agreement, or other binding written obligation of the City and County. [Ordinance] For purpose of these regulations,

"contract" shall include concessions, construction contracts, leases and rental agreements.

"Contracting officer" shall mean that officer or employee of the City and County authorized under the Charter, the Administrative Code or the Municipal Code, to enter into a contract on behalf of the City and County. "Contracting officer" shall include the Mayor, the Chief Administrative Officer, each department head or general manager, and other employees of the City and County authorized to enter into contracts or other binding agreements on behalf of the City and County.

[Ordinance]

"Contractual services," for purposes of §10.213 of the Administrative Code, shall mean investment counseling, underwriting, acting as a trustee or escrow agent, providing any consulting advice or assistance under a professional or personal service contract. "Contractual services" shall not include transactions of the City and County subject to §10.212 of the Administrative Code, or purchase orders, term purchase agreements or other agreements of the City and County for the purchase of a commodity under §10.214. [Ordinance]

"Doing business in South Africa" shall mean having an office in South Africa, having a South African subsidiary, or having an authorized company representative in South Africa. "Doing business in South Africa" shall not include selling commodities to a customer located in South Africa.

"Fiduciary duty" shall mean generally the responsibility of a contracting officer to pay scrupulous attention to the City's interests, and shall mean specifically the responsibility not to waste money.

"Government of South Africa" or "South Africa" shall mean any public or quasi-public entity operating within the Republic of South Africa, including, not limited to, municipal, provincial, national, or other government bodies (including all departments, agencies and other instrumentalities of such bodies), public utilities, public facilities, or any national corporation in which the public sector of the Republic of South Africa has a financial interest or operational responsibilities, and including Bantustans or so-called independent "Homelands."

[Ordinance]

"Proposal" is defined in Administrative Code Section 21.1, "Definitions," part (c), as "a bid requiring advertising." Purchasing refines this further to mean the bid package the Purchasing Department may send or make available to bidders. Bidders respond to a proposal by submitting a bid.

"Purchaser" shall mean the Purchaser of the City and County or any authorized representative of that official. [Ordinance]

"Quotation" is defined in Administrative Code Section 21.1, "Definitions," part (b), as "a bid not requiring advertising." (The Code, in §§21.6 and 21.7, requires advertising for transactions estimated to cost more than \$50,000.) The Purchasing Department refines the definition

further to mean price information provided by a vendor to the City in response to the City's request via telephone or sending a Form 270 to the vendor. Purchasing uses these methods (and may use others) only for transactions under \$50,000. See "bid" above.

"Sealed bid" shall mean a bid which is submitted to the City in a sealed envelope and which is not opened by the City until the time noted by the City in its earlier Request for Bid.

III. Transactions Exempt from the Ordinance

The ordinance notes certain types of purchases which are not subject to the ordinance. An exemption generally means that the City can purchase from a company which does business in South Africa.

The exceptions include:

1. For services, contracts entered into, bid packages advertised, and sealed bids received before March 9, 1986, the effective date of the ordinance. [\$10.213.E.1]
2. For commodities, binding contracts entered into before the effective date of the ordinance. [\$10.214.C.1]
3. Contracts for \$5,000 or less. For term purchase agreements (TPA's), the \$5,000 limit applies to the aggregate value of the TPA, not to individual orders placed under a TPA. For example, if ABC Widget

Corp. does business in South Africa, the City could not award a TPA to ABC Widget which would allow Department X to order \$10,000 (or any other amount over \$5,000) worth of widgets over twelve months, even though the TPA stated that no order could exceed \$2,000. [\$10.213.E.2 (services), \$10.214.C.3 (commodities)]

It is permissible for two City departments each to have one \$5,000 TPA or purchase order for an otherwise proscribed vendor. It is also permissible for one department to request a \$4,000 purchase order for a proscribed vendor, and later to request another \$4,000 purchase order for the same vendor, so long as the transactions were genuinely separate and the department did not split an \$8,000 transaction in order to evade the ordinance.

4. Extensions, amendments, or renewals of contracts between the City and vendors to complete a project where the original contract was entered into before the effective date of the ordinance, where necessary for the timely completion of the project, and where the total amount of money to be spent has not increased. [\$10.213.E.3] "Project" shall include construction, renovation, remodeling, and other improvements to the City's buildings, structures, systems, highways and other property.
5. Situations where no business doing business in San Francisco can comply with the ordinance. [\$10.213.E.4(a) (services), \$10.214.C.4 (commodities)] This exception shall also include situations where not business doing business in San Francisco sells the service or

commodity desired. For example, if no business in San Francisco services widgets, and two companies in Oakland do services widgets, and one of the companies could submit an affidavit and the other could not, then the City may conduct the transaction without reference to the ordinance.

6. Situations where to award to a company able to comply with the ordinance instead of to a company not able to comply would subject the City to a financial loss which, in the opinion of the contracting officer, would violate his or her fiduciary duty.
[\$10.213.E.4(b) (services), \$10.214.C.5 (commodities)]
7. Contracts where applying the ordinance's provisions or including required contract language would conflict with award provisions of a government grant, subvention, or contract which is funding the particular purchase. On occasion the City receives money from the Federal Government or California, and the awarding agency may prescribe that only certain clauses may appear in contracts the City writes pursuant to the grant. If the agency will not allow the City to apply the ordinance to a particular contract, then the transaction is exempt from the ordinance.

Unless a contracting officer is advised otherwise by a requesting department or the agency itself, the contracting officer may consider all orders for services and commodities which are funded by the Department of Transportation's Urban Mass Transit Administration (UMTA), or are orders for San Francisco City College, to be

exceptions to the ordinance. The contracting officer therefore may place such orders without reference to the ordinance.

IV. Responsibilities of Contracting Officers

A. Background

Several City departments have authority to sign contracts on behalf of the City. (The Purchasing Department issues most contracts.) Other contracting departments include:

Arts Commission

Asian Art Museum

California Academy of Sciences

City Attorney

City Planning

Community College District

Convention Facility

Fine Arts Commission

Mayor

Parking Authority

Port of San Francisco

Public Library

Public Utilities Commission

Public Works

Real Estate

Recreation and Park Department (leases and concessions, rather than contracts for the purchase of services and commodities)

Redevelopment Agency

Retirement Board

San Francisco International Airport

Certain provisions of the Administrative Code and Municipal Code give the Mayor and the Chief Administrative Officer authority to enter into specified types of contracts.

B. Specific Responsibilities

Contracting officers shall:

1. Purchase services and commodities only in accordance with the provisions of the ordinance and these regulations.
2. Submit implementation reports to the Purchaser in accordance with Section IX. of these regulations.
3. Submit to the Purchaser the originals of affidavits obtained from service contractors, in accordance with Section V.A.3 of these regulations.
4. Consult with the City Attorney's Office, as necessary, to resolve questions and disputes concerning the ordinance, affidavits, contractor protests, and other related matters, in accordance with Section VIII of these regulations.

V. Purchase of Services

A. Collection of Affidavits

The ordinance requires that the contracting officer not award a service contract to a contractor who has not submitted to the City

the required affidavit, unless an exception applies.

1. Form of Affidavit

Contracting officers shall require service contractors to submit affidavits which are substantially similar to the sample which appears as Exhibit 1 to these regulations.

2. Frequency of Collection

The general trend is for businesses to reduce or eliminate their business dealings in South Africa. Businesses which have submitted affidavits to the City are unlikely to change their business practices such that they would no longer be able to do business with the City. In addition, affidavits require the contractor to inform the City if its South African business relationships (or lack of same) changes. As a result, no general need exists to request subsequent affidavits from businesses for whom the City already has affidavits on file.

A contracting officer need request and obtain only one affidavit from a service contractor. If any contracting officer has a contractor's affidavit on file, then all other contracting officers may rely on that affidavit and need not request their own.

Only if a contracting officer has reason to believe that a

contractor who has submitted an affidavit to the City is engaging in proscribed South African business relations, and has not so informed the City, shall the contracting officer request a subsequent affidavit from the contractor.

3. Central Records

The Purchaser shall maintain central records of all affidavits. When a contracting officer other than the Purchaser requests and obtains an affidavit, the contracting officer shall send the original of the affidavit to the Purchaser and may retain a copy at his or her discretion.

B. Service Contracts which are Bid; the "Fewer than Two" Rule

§10.213.D.2 of the ordinance describes the bid process for service contracts subject to competitive and sealed bid. The provision states in part that when the City receives fewer than two bids which submit the required affidavit, then the City may rebid the contract and waive the requirements of §10.213.

This provision can interact with other parts of the ordinance, including the fiduciary duty standard, in a variety of ways. Consider the following examples. When the examples state that a business is a San Francisco business, it assumes that the business is a certified local business enterprise (LBE), pursuant to the MBE/WBE/LBE ordinance, Chapter 12D of the Administrative Code.

Example 1

The City solicits bids for phrenology services from five vendors. The bid solicitation notifies the vendors of the "fewer than two" rule. Three bidders submit bids, one with an affidavit and two without. Two bidders do not respond.

The breakdown of bidders, prices, affidavits, and locations is:

Bidder A:	\$5,001	no affidavit	San Francisco
Bidder B:	5,100	no affidavit	San Francisco
Bidder C:	5,500	affidavit	San Francisco

The contracting officer has several options:

- (1) Rebid and waive \$10.213, as allowed by the "fewer than two" rule. The contracting officer would probably rebid only when the possibility of obtaining lower prices, which could be the \$5,001 price from Bidder A or a lower price from a vendor not yet heard from, outweighs the time and expense of a second round of bidding.
- (2) Award the contract to Bidder A. If all other aspects of the bids are equal, this award can be made only if the contracting officer believes that to award to Bidder C would violate the fiduciary duty standard. The \$5,100 bid is non-responsive, and if price is the only difference

between bids, then fiduciary duty is the only reason to award to someone other than Bidder C.

- (3) Award to Bidder C. This could occur if a second round of bidding was believed to be more time and effort that would be justified by the potential savings.

Example 2

The breakdown is:

Bidder A:	\$5,001	no affidavit	San Francisco
Bidder B:	5,100	affidavit	San Francisco
Bidder C:	5,500	affidavit	San Francisco

Award possibilities are:

- (1) Award to A. Absent other differentiating factors, this could occur only pursuant to the fiduciary duty standard. Note that rebidding is not permitted under the section, because two affidavits have been submitted.
- (2) Award to B. This would be the most likely outcome, because B is the lowest responsive bidder. If price and affidavit are the only criteria which show differences between bidders, B would receive the award, unless, as noted in (1), the fiduciary duty standard dictated award

to A.

Example 3

Bidder A:	\$5,001	no affidavit	San Francisco
Bidder B:	5,100	no affidavit	San Francisco
Bidder C:	5,500	no affidavit	San Francisco

In this example, no one has submitted a responsive bid. Under §10.213.E.4(a), award can be made without reference to the ordinance because no vendor doing business in the City could submit the affidavit.

The contracting officer is free to rebid if advisable, pursuant to the "fewer than two" rule. Or, if rebidding was deemed not worthwhile, award could be made to A on the basis of price.

Example 4

Bidder A:	\$5,500	no affidavit	San Francisco
Bidder B:	5,001	affidavit	Oakland
Bidder C:	5,100	no affidavit	San Francisco

Because no one in San Francisco supplying the service can comply with the ordinance, then the ordinance is waived. Applying the LBE bid preference, C's price is \$4,845, and award must be made to C.

Example 5

Bidder A:	\$5,001	affidavit	San Francisco
Bidder B:	5,001	no affidavit	San Francisco
Bidder C:	5,001	affidavit	Oakland
Bidder D:	5,001	no affidavit	Oakland

Assuming that neither A nor C is an MBE or WBE, award would be made to A, because the MBE/WBE/LBE ordinance's 5% bid preference would apply to A's bid. Only two bids, A's and C's, are responsive, because they included affidavits. All bid prices are equal. After application of the bid preference, A's bid is \$4,751 and C's remains \$5,001.

Note, however, that A's bid is considered to be less than \$5,000 only for purposes of the bid preference, and not for purposes of the divestment ordinance.

Example 6

Bidder A:	\$5,001	no affidavit	San Francisco
Bidder B:	5,500	no affidavit	San Francisco
Bidder C:	5,001	affidavit	Oakland
Bidder D:	6,000	no affidavit	Oakland

The "fewer than two" rule appears applicable here, because only one affidavit has been submitted. But so is §10.213.E.4(a),

because no San Francisco vendor submitted an affidavit.

Therefore, award will be made to A, after application of the bid preference. Assuming no one is an MBE or WBE, A is the low bidder with a bid of \$4,751.

Example 7

Bidder A:	\$5,001	no affidavit	San Francisco
Bidder B:	5,002	affidavit	San Francisco
Bidder C:	5,100	affidavit	Oakland

In this instance, applying the ordinance by awarding to B costs the City \$1. It is unlikely that the \$1 premium would violate a contracting officer's standard of fiduciary duty.

VI. Purchase of Commodities

A. Introduction

Section 10.214 of the ordinance covers how the City purchases commodities, as opposed to services. The section concentrates on the business entity from whom the City will purchase, rather than on the manufacturer of the commodity. Subject to certain exceptions, the City may not purchase commodities made in South Africa, substantially altered in South Africa, or commodities from a person or entity doing business in South Africa.

As noted in Section II. Definitions, "doing business" means more than simply having South African customers. A company must have a physical presence in South Africa, via either an office or a representative. For example, if ABC Widget Corp. has advertised in the International Edition of Time magazine, and a South African business responds to the ad by ordering a widget, ABC is not disqualified from selling widgets to San Francisco.

B. Contract Language

1. Required Provision Concerning the Contractor

The City's commodity contracts must contain the following paragraph:

"Seller is not the government of South Africa, person or business entity organized under the laws of South Africa, or a person or entity doing business in South Africa. The item(s) sold in this contract (purchase order) to the City and County of San Francisco is (are) not made in South Africa as defined in section 10.214(A) of the San Francisco Administrative Code. The City and County reserves the right to terminate this contract for default if the contractor furnishes items made in South Africa."

2. Incorporation of Ordinance by Reference

Section 10.215(B) requires that "all contracts and written agreements shall incorporate this Article by reference whenever applicable ... " To that end, all City commodity (and service) contracts shall contain the following paragraph:

"Article XIX of the San Francisco Administrative Code is incorporated herein by reference and made a part hereof."

3. Liquidated Damages

Section 10.217(B) requires bidders and contractors to observe two additional provisions related to liquidated damages. The City's bid packages and/or contracts, as appropriate, must contain appropriate versions of the following:

"In the event bidder (contractor) fails to comply in good faith with any of the provisions of Article XIX of the San Francisco Administrative Code, bidder (contractor) shall be liable for liquidated damages for each violation in an amount equal to the bidder's (contractor's) net profit on the contract, or ten percent (10%) of the total amount of the contract, or one thousand dollars (\$1,000), whichever is greatest. Bidder (Contractor) acknowledges and agrees that the liquidated damages assessed shall be payable to the City and County upon demand and may be set off against any monies due to bidder (contractor) from any contract with the City and County of San Francisco."

C. Manufacturer v. Distributor

1. General

Because the ordinance speaks in part of purchasing from companies doing business in South Africa, the City may encounter a transaction where purchasing from the manufacturer is prohibited but from a distributor is not.

In certain circumstances, a manufacturer's relationship with a distributor prohibits purchases from the distributor as well as the manufacturer. See paragraph 2 below.

The following two examples assume that neither of the entities is an MBE/WBE/LBE.

Example 1

The City wants to buy a Sony VCR, and can purchase either directly from Sony or through a distributor of many brands of VCR. (In fact, Sony does not make retail sales, so this is only a hypothetical.) The bids submitted to the City are:

Sony: \$5,001

Dist'r: 5,001

Award would be made to the distributor, because Sony does

business in South Africa.

Example 2

Same as Example 1, but the bids are:

Sony: \$5,001

Dist'r: 5,501

The contracting officer would have to determine if paying the extra \$500 to purchase from the distributor would violate the fiduciary duty standard. If it would, then the City would buy from Sony; if not, from the distributor.

D. Determining if Bidders Can Sign the Contract

The ordinance does not require any pre-award assurance from a vendor regarding South African relations. The only requirement is that the contract contain the required paragraphs.

The contracting officer may, but is not required to, ask a potential vendor questions about the vendor's South African business relations. When soliciting bids, the contracting officer also may, but is not required to, bring potential bidders' attention to the contract provision relating to South Africa. The contracting officer acting in good faith may rely on the vendor's signature on the contract as evidence that the vendor does not have proscribed

South African business relations.

If the contracting officer has sufficient reason to doubt either the potential vendor's ability to sign the contract, or the vendor's thoroughness or accuracy when signing the contract, then the contracting officer shall bring the ordinance to the vendor's attention. "Sufficient reason" shall be determined in the contracting officer's discretion. The contracting officer and vendor will clarify the vendor's South African business relations, and the contracting officer will obtain from the vendor a written confirmation of the clarification. If the vendor has proscribed business relations, then the contracting officer must explore whether any of the ordinance's exceptions apply to the vendor and the contract. If not, then the contract must be terminated for breach as soon as practical. The contracting officer will consider whether terminating the contract will cause the City undue delays or disruptions.

E. Bidding Examples

This paragraph covers several bidding situations contracting officers might encounter. Instead of indicating whether or not the bidders can sign the affidavit (which applies to services), the examples note whether the bidders can sign the contract which contains the required language.

Note that the "fewer than two" rule does not apply to commodity

purchases, only to services.

Example 1

The City solicits bids for widgets from five vendors. The bid solicitation notifies the vendors of the paragraph on South Africa which will be part of the eventual contract. Three bidders submit bids, two indicating that they cannot sign the contract because of the South African language, and one bidder indicating nothing. Two bidders do not respond.

The breakdown of bidders, prices, ability to sign the contract, and locations is:

Bidder A:	\$5,001	cannot sign	San Francisco
Bidder B:	5,100	cannot sign	San Francisco
Bidder C:	5,500	can sign (assumed)	San Francisco

The contracting officer has several options:

- (1) Award the contract to A. If all other aspects of the bids are equal, this award can be made only if the contracting officer believes that to award to Bidder C would violate the fiduciary duty standard. The \$5,001 bid is non-responsive, and if price is the only difference between bids, then fiduciary duty is the only reason to award to someone other than C.

- (2) Award to Bidder C, unless the fiduciary duty would be violated.

Example 2

The breakdown is:

Bidder A:	\$5,001	cannot sign	San Francisco
Bidder B:	5,100	can sign (assumed)	San Francisco
Bidder C:	5,500	can sign (assumed)	San Francisco

Award possibilities are:

- (1) Award to A. Absent other differentiating factors, this could occur only pursuant to the fiduciary duty standard.
- (2) Award to B. This could be the most likely outcome, because B is the lowest responsive bidder. If price and contract-signing ability are the only criteria which show differences between bidders, B would receive the award, unless, as noted in (1), the fiduciary duty standard dictated award to A.

Example 3

Bidder A:	\$5,001	cannot sign	San Francisco
Bidder B:	5,100	cannot sign	San Francisco
Bidder C:	5,500	cannot sign	San Francisco

In this example, no one has submitted a responsive bid. Under §10.214.C.4, award can be made without reference to the ordinance because no vendor doing business in the City could sign a contract containing the required paragraph.

On the basis of price, award would be made to A.

This outcome assumes that the contracting officer has made reasonable efforts to locate potential vendors located in San Francisco (see Section ____). A contracting officer is not allowed, for example, to tailor a bid list which excluded San Francisco vendors who had a reasonable prospect of being the lower bidder and who were able to sign the contract. Such a bid list might result in only non-San Francisco vendors responding, which would allow the contracting officer to waive the ordinance.

Example 4

Bidder A:	\$5,001	can sign	San Francisco
Bidder B:	5,001	cannot sign	San Francisco
Bidder C:	5,001	can sign	Oakland
Bidder D:	5,001	cannot sign	Oakland

Assuming that neither A nor C is an MBE or WBE, award would be made to A, because the MBE/WBE/LBE ordinance 5% bid preference would apply to A's bid. Only two bids, A's and C's, are responsive, because they Bidders B and D indicated that they are unable to sign

the contract. All bid prices are equal. After application of the bid preference, A's bid is \$4,751 and C's remains \$5,001.

Note, however, that A's bid is considered to be less than \$5,000 only for purposes of the bid preference, and not for purposes of the divestment ordinance.

Example 5

Bidder A:	\$5,001	cannot sign	San Francisco
Bidder B:	5,500	cannot sign	San Francisco
Bidder C:	5,001	can sign	Oakland
Bidder D:	6,000	cannot sign	Oakland

Section 10.214.C.4 becomes relevant because no San Francisco vendor can sign the contract.

Therefore, award will be made to A, after application of the bid preference. Assuming no one is an MBE or WBE, A is the low bidder with a bid of \$4,751.

VII. Combined Service/Commodity Contracts

A. Introduction

Certain transactions lend themselves to contracts where the vendor provides both service and a commodity. This section covers several

such situations and provide guidance on how to proceed.

B. General Rule

When such a situation occurs, the contracting officer will separate the service and commodity components of the contract, if practical. If the separation is not practical, then the contract will be treated as a service contract. Separation would not be practical if vendors were unwilling to bid on the separate parts of the contract, or if the contracting officer determined that the risk of, for example, scheduling difficulties dictated the award of only one combined contract.

If separation is practical, then the two contracts would be handled separately, at least through the bid or negotiation phases. If application of the ordinance would cause the award of one contract to one vendor and the other to a second vendor, then the contracting officer will evaluate the effects of structuring the transaction in this manner. The most likely example of such an event would have the City purchase the parts of the manufacturer and the service from someone else. (Only Otis sells Otis elevators.)

C. Examples

1. Construction and Facilities-Related Contracts

Consider a situation where the City needs a building built or

needs an elevator installed. The (general) contractor does not simply deliver a building to the site--the contractor provides substantial services, either directly or through subcontractors: project management; scheduling; inspection; etc. And the contractor may purchase many of the materials, depending on how many materials the City may wish to purchase directly.

As another example, the need for an elevator could cause the City to negotiate a "furnish and install" contract. Historically, elevator manufacturers install their elevators as well as build the mechanism and parts.

2. Architectural Services

The City could contract with an architect to design a new building. The architect delivers a commodity, the blueprints, to the City at the end of contract performance.

For purposes of these regulations, contracts with architects will be considered service contracts.

3. Printing

A printing contract could contain a significant services component. For example, if the printer were designing and printing a brochure, then the design and layout are clearly

services, even though the final product is 10,000 copies of the brochure.

Printing contracts involving a significant amount of design or other services will be considered service contracts. Printing contracts not involving such services (such as a contract for 10,000 copies of an original provided by the City) will be considered commodity contracts.

4. Leases, Rental Agreements, and Concessions

Although the service and commodity sections of the ordinance concern them primarily with contracts where the City is spending money and receiving services or commodities in return, the ordinance also applies to transactions where the City receives money. (In the "Definitions" section of the ordinance, "contract" is defined to include "any ... binding written obligation of the City and County.")

The City, as a landlord, executes many leases and rental agreements with its tenants. The City also allows contractors to use City property for more than simply office space, such as boat rental operations on the lakes.

Such contracts are considered contracts for services for purposes of the ordinance.

VIII. General Issues

A. Introduction

This section covers issues which can apply equally to service and commodity transactions.

B. Assignment

1. General

Under certain circumstances, it may be advisable for the City and a contractor to agree that part of the contractor's performance will be done by a second contractor. (When the duty to perform is transferred by the contractor, that is a delegation. When the right to be paid is transferred, that is an assignment. For convenience, both assignment and delegation are usually referred to simply as "assignment.")

Whether or not assignment is contemplated at the outset of a contract, City contracts usually contain provisions prohibiting the contractor from assigning any part of performance without the written approval of the City.

2. Application

The ordinance does not address assignment explicitly, but

because an assignment of a City contract usually involves the City's approving the assignment via a second contract with the first contractor, the second contract comes within the scope of the ordinance.

If the assignment keeps the first contractor liable to the City if the second contractor does not perform, then the second contractor may have proscribed South African business relations. The City is still considered to be purchasing the services or commodities from the first contractor, not the second. This rule applies even though the City after the assignment may be paying the second contractor directly, and not paying the first contractor who in turn could pay the second.

If the assignment absolves the first contractor of any responsibility for the performance to be done by the second contractor, then the City is deemed to be doing business with the second contractor, who therefore may not have proscribed South African business relations.

C. Subsidiaries

A company is considered to be doing business in South Africa if it owns any part of any business which does business in South Africa. For example, if Company X owned 10% of Company Z, and Company Y owned 90% of Company Z, and Z was a South African business or had

proscribed South African business relations, the City could be prohibited from purchasing from either X or Y.

D. Emergencies

If an emergency exists and it would take too much time to survey the market in search of contractors without South African business relations, then the contracting officer may purchase from companies which would otherwise be ineligible under the ordinance from doing business with the City. One or more of the following reasons may justify this course of action:

1. If life, health, or significant financial losses were at stake if a contract were not awarded immediately, then the contracting officer would be violating the fiduciary duty standard if time were taken to locate other vendors.
2. Section 21.25 of the Administrative Code authorizes emergency procurement to be made "in the most expeditious manner possible." Under appropriate circumstances, the contracting officer may find that "the most expeditious manner possible" may mean without reference to the ordinance.

E. Preparing Bid Lists

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IX. Resolution of Questions and Disputes

A. General

As the City operates under the ordinance, purchasing situations may arise which require clarification. This section describes some of the circumstances which may be encountered and provides general information on where guidance may be found.

Examples appear in paragraph E below.

B. South African Business Relations: Service v. Commodities

City contracting officers and departments may anticipate that many questions relating to the ordinance will center around the extent of a City contractor's South African business relations. The ordinance treats this issue differently, depending on whether the City plans to purchase services or commodities from the contractor.

The ordinance states that the City's service contractors may not provide services to a customer for the express purpose of helping the customer's business in South Africa. City contractors, in evaluating the extent of their customers' South African ties, need make inquiries which are only within the normal course of business (§10.213.A(3)). In contrast, the commodities section of the ordinance does not address the relationships between City contractors and their customers--only the South African ties of City

contractors are covered.

This means, for example, that the City may purchase widgets from a Company X which sells widgets to Company Y in the United States for the purposes of facilitating Y's operating in South Africa. The City could not purchase services from X, however, if X provided services to Y for the same purposes.

C. Contracting Officers

When a contracting officer needs guidance or information on how to conduct a transaction under the ordinance, the following sources should be consulted, generally in the order indicated:

1. the ordinance.
2. these regulations.
3. the City Attorney's Office.

D. All Other City Departments

For City departments which do not have contracting officers, when questions arise the following sources should be consulted:

1. the ordinance.

2. these regulations.
3. the contracting department which will place the particular order. For most transactions, this will be the Purchasing Department.
4. the City Attorney's Office.

E. Avoiding Delays or Disruptions

1. Prior to Contract Award

The award of a contract need not be delayed by any allegation by a third party that a contractor to whom the City is about to award a contract either submitted a false affidavit or signed a commodity contract while violating the required South African-related provision.

Award need not be delayed simply because issues have been submitted to the City Attorney's Office to resolution.

If delaying the award of a contract would cause the City harm in the contracting officer's opinion, then the contracting officer acting in good faith may award a contract even if other uncertainties exist regarding the contractor's South African business relations. Such uncertainties could include questions from the contractor regarding its customers' possible

South African relations.

2. During Contract Performance

Section 10.217 of the ordinance authorizes the City to suspend the contract if it is determined that a contractor has submitted a false affidavit. The ordinance does not explicitly address the City's alternatives if the City determined that a contractor under a commodity contract had signed the contract knowing that the contractor was not abiding by the required South African provisions.

The contracting officer may decline to suspend the contract involving a false affidavit if the contracting officer determines that the disruption of performance, possible rebidding, and other possible consequences would not be in the City's best interests. It may be more important to the City to have performance completed and then to exercise sanctions and other remedies against the contractor than to suspend the contract quickly.

F. Examples

This paragraph presents sample situations and describes procedures applicable if an issue arises regarding a contractor's or potential contractor's South African business relations, or the South African business relations of a contractor's or potential contractor's

customers.

Example 1: Contractor's Question on Business Relations

A contractor or potential contractor requests clarification of whether certain of its business relations are proscribed by the ordinance or regulations. The contracting officer may ask the contractor to submit its question in writing, and then proceeds as outlined above, consulting first the ordinance, then the regulations, and finally the City Attorney's Office.

Example 2: Other Business Questions Contractor's Assurances

A third party questions the veracity of a (potential) City vendor's assurances, either in the affidavit or commodity contract, that the vendor does not have proscribed South African business relations. The contracting officer requests that the third party submit its objections in writing within two calendar weeks. If the third party declines, or if the third party submits written objections after the two-week time limit, then the contracting officer may consider the protest to be without merit.

If the third party submits its allegations in writing and within the time prescribed, the contracting officer reviews it and determines whether it has merit. In this process, the contracting officer may request additional information or clarification from the contractor in question.

If the contracting officer concludes that the third party's allegations are without merit, the third party is so notified, with a copy of all correspondence and related material to the City Attorney's Office. If the contracting officer concludes that there is merit but that the contractor continues to assert its lack of proscribed South African business relations, then the contracting officer prepares a memo to the City Attorney's Office which sets forth the facts in full. The contracting officer sends the memo, with appropriate supporting documentation, to the City Attorney's Office with a request for an opinion on how to proceed.

X. Implementation Reports

A. General

Section 10.219, "Implementation Reports," describes responsibilities of City departments regarding periodic reports to the Board of Supervisors on the implementation of the ordinance. The Treasurer and Purchaser write separate reports for their separate areas. All departments, boards and commissions are required to cooperate with the Treasurer and Purchaser as needed as the two offices prepare their reports for the Board.

The first report is due nine months after the effective date of the ordinance. The second report is due three months later. Subsequent reports are due semi-annually thereafter.

The Purchaser currently plans to issue implementation reports according to the following schedule:

Report 1	November 28, 1986
Report 2	February 27, 1987
Report 3	August 31, 1987
Report 4	February 29, 1988
Report 5	August 31, 1988
Report 6	February 28, 1989

and so on

B. Responsibilities of Contracting Departments

1. Applicability

This section applies to the City departments which have authority to execute contracts and commit money in the name of the City and County of San Francisco. As noted in section IV, these departments include:

Department of Public Works

Port of San Francisco

Public Utilities Commission

Recreation and Park Department (leases and concessions, rather

than contracts for the purchase of services and commodities)

San Francisco International Airport

And any other departments authorized in any San Francisco Code to enter into contracts.

2. Schedule

To enable the Purchaser to submit reports to the Board of Supervisors according to the above schedule, each contracting department will submit an implementation report to the Purchaser one calendar month before each of the above dates.

3. Content

The report will describe how each contracting department is implementing the ordinance, and will contain, at a minimum, the following information:

- a. data comparing the number and dollar amount of contracts awarded to companies without proscribed South African business relations, and to companies with those relations.
- b. except for contracts of \$5,000 or less, for each contract awarded pursuant to an exception to the ordinance: contract amount, name of contractor, service or commodity

purchased, applicable exception.

- c. for transactions in which the department awarded to a company without proscribed business relations, and had the ordinance not been in effect the department would have awarded to a lower bidder, a total of the price differences paid by the City.
- d. for transactions in which the department believes that the application of the ordinance dissuaded some companies from submitting bids or proposals, an estimate (if one can be made usefully) of what the City might have saved had the ordinance not been in effect.
- e. for instances where the department conducted a second round of bidding for a service contract because fewer than two bidders had submitted affidavits (either as part of the first bidding cycle or earlier), a general description of the transaction, including the prices offered by all bidders in each round of bidding.
- f. an estimate (if one can be made usefully) of what effect the Divestment ordinance has had on the contracting department's and/or the City's progress under the MBE/WBE/LBE ordinance. For example, if the Divestment ordinance affects contracting activity such that the City purchase less from large business and more from small

business than formerly, then MBE/WBE/LBE contracting opportunities are probably enhanced.

On the other hand (this example is hypothetical), consider the situation where GM sells in South Africa and Ford does not. If the City used to purchase GM cars from a local MBE dealer in GM cars and changed to purchasing Ford from a local non-MBE Ford dealer, then MBE contracting opportunities would have declined due to the ordinance.

Affidavit

[Please indicate that either or both of the following alternatives apply to your company by initialling in the left margin.]

Alternative 1

This company hereby certifies that it does not have any outstanding relationships of the type listed in Section 10.213(A) of the San Francisco Administrative Code, to wit, the provision of contractual services to:

- (1) the government of South Africa;
- (2) any business or entity organized under the laws of South Africa; or,
- (3) any business entity for the express purpose of assisting that business's operations in, or that business's trading with, any public or private entity located in South Africa. In determining whether contractual services are provided by this company to one of our customers for the express purpose of assisting that customer's trading with any public or private entity located in South Africa, this company has not made inquiry beyond that made in the normal course of this company's business.

This company will promptly notify the City and County of San Francisco if we subsequently enter into any contractual agreement with the entities listed in Section 10.213(A).

Alternative 2

This company's practice is not to enter into any contractual relations with entities of, or doing business in, South Africa, until the system of apartheid is no longer law in South Africa. This company will promptly notify the City and County of San Francisco if our practice of foregoing such contractual relations changes.

Date

Name of Company

Signature of Company Official

Address

Name

City, State, ZIP

Title



